LIBRARY
SUPREME COURT, U.S.

FILED
JUN 5 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 198

PHILIP J. HIRSCHKOP,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

GEORGE ALLEN, SR.
1809 Staples Mill Road
Richmond, Virginia

ROBERT T. HALL
110 North Royal Street
Alexandria, Virginia

ARTHUR KINOY
180 University Avenue
Newark, New Jersey

MELVIN L. WULF
American Civil Liberties Union
156 Fifth Avenue
New York, New York

MORTON STAVIS
116 Market Street
Newark, New Jersey

Counsel for Petitioner

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes and Constitutional Provisions Involved 3

Statement of the Case 5

1. Statement of Facts 5

2. Proceedings Below 20

Reasons for Granting the Writ 24

POINT ONE

The federal constitutional questions raised in this Petition are properly before this Court 24

POINT TWO

The state court conviction for contempt of court violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States in that the record is entirely lacking in evidence to support any of the charges 26

POINT THREE

The state court judgment of contempt violates Article VI, Clause 2 of the Constitution of the United States, the Supremacy Clause 40

PAGE

POINT FOUR

The state court judgment of contempt violates the fundamental guarantee of right to counsel embodied in the Sixth and Fourteenth Amendments to the Constitution of the United States 51

POINT FIVE

The state court judgment of contempt violates the First Amendment to the Constitution of the United States as incorporated into the Fourteenth Amendment 55

POINT SIX

The state court judgment of contempt violates the notice requirement of the Due Process Clause of the Fourteenth Amendment 56

POINT SEVEN

The state court judgment of contempt constitutes selective enforcement of state law in violation of the Fourteenth Amendment 58

POINT EIGHT

The conduct of the contempt proceeding by the original trial judge deprived Petitioner of a fair trial in violation of the Due Process Clause of the Fourteenth Amendment 60

CONCLUSION 67

PAGE

APPENDIX A

Opinion and Judgment of the Supreme Court of Appeals of Virginia, March 10, 1969, Opinion by Justice Albertis S. Harrison, Jr. 69

APPENDIX B

Opinion of Trial Judge at Contempt Proceeding, Corporation Court of the City of Lynchburg, Judge O. Raymond Cundiff, 9/13/66 76

TABLE OF AUTHORITIES

Cases:

Adderly v. Florida, 385 U.S. 39, 87 S.Ct. 242 58
Allman v. Hanley, 302 F.2d 559 (5th Cir. 1962) 32, 40, 41
Arkansas v. Howard, 218 F. Supp. 626 (D.C. Ark. 1963) 32, 40, 41

Bro. of Railroad Trainmen v. Virginia, 377 U.S. 1 ....50, 51
Brown v. City of Meridian, 356 F.2d 602 (5th Cir. 1966) 42, 43, 44
Brown v. Maryland, 12 Wheat. 419 .....46, 47, 48
Brown v. Wechsler, 135 F. Supp. 622 (D.C. 1955) 32, 40
Bryant v. Commonwealth, 198 Va. 148 27

Carter v. Commonwealth, 96 Va. 791 31
Cole v. Arkansas, 333 U.S. 196 (1948) 33, 35, 56, 58
Cooke v. U. S., 267 U.S. 517 (1925) 56, 61, 64
Cox v. Louisiana, 379 U.S. 536 .....58, 59

Davis v. Wechsler, 263 U.S. 22 47
Dienstig v. St. Paul Fire & Marine Ins. Co., 164 F. Supp. 603 (S.D.N.Y. 1957) 40, 43
Dombrowski v. Pfister, 380 U.S. 479 (1965) 53, 54, 56, 59

Edwards v. South Carolina, 372 U.S. 229 58

PAGE

Garner v. Louisiana, 368 U.S. 157 ..... 26, 56

Harrison v. St. Louis-S.F.R. Co., 232 U.S. 318 ..... 48, 49, 50
Henry v. Mississippi, 379 U.S. 443 (1965) 25, 26
Hicks v. U. S., 150 U.S. 442 38
Hines v. Lowrey, 305 U.S. 85 47
Hoffman v. Bethlehem Steel Corp., 31 F. Supp. 683 (N.D. W.Va. 1940) 44
Holt v. Commonwealth, 205 Va. 332 ..... 52, 60
Holt v. Virginia, 381 U.S. 131 ..... 30, 31, 51, 52
Hopson v. North American Insurance Co., 71 Idaho 461, 233 P.2d 799 ..... 32, 40, 41, 45

In re Murchison, 349 U.S. 133 (1955) 62, 64, 65, 66, 67

Jones v. Elliot, 94 F. Supp. 567 (1950) 44

Kalb v. Feuerstein, 308 U.S. 422 (1940) 46
Kidd v. Virginia Deposit Co., 113 Va. 612 27

Lever Bros. Co. v. J. Eavenson & Sons, 7 F. Supp. 679 (S.D.N.Y. 1954) 44
Liberty Natl. Bank of Dickinson v. Daly, 96 N.W.2d 897 (N.D. Sup. Ct. 1959) 44
Local 1333B United Maritime Div. v. Commonwealth, 193 Va. 773 27
Loving v. Commonwealth, 206 Va. 924 (1966) 23, 24, 25, 26
Lowe v. Jacobs, 243 F.2d 432 (5th Cir. 1957) 32, 40, 41

Martin v. Hunter's Lessee, 1 Wheat. 304 (1816) 46, 48
McCulloch v. Maryland, 4 Wheat. 316 (1819) 46, 47, 48
Murdock v. City of Memphis, 200 Wall. 590 (1874) 25

NAACP v. Alabama, 357 U.S. 449 25
NAACP v. Button, 371 U.S. 415 ..... 50, 51, 53, 55, 56, 59
Nicholas v. Commonwealth, 186 Va. 315 27

Offutt v. U. S., 348 U.S. 11 (1954) 60, 61, 64, 65, 67

PAGE

Panico v. U. S., 375 U.S. 79 (1963) 27
Patterson v. Refining Engineering Co., et al., 183 F. Supp. 459 (D.C.N.M. 1960) 44
Peacock v. City of Greenwood, 384 U.S. 808 (1960) 30
People v. Post Standard Co., 13 N.Y.2d 185, 195 N.E.2d 48 (1963) 27
Postal Telegraph Cable Co. v. Norfolk & W.R. Co., 88 Va. 929 ..... 27, 33, 38, 39
Powell v. Alabama, 287 U.S. 45 53

Rachel v. Georgia, 384 U.S. 780 (1966) 34, 47
Reynolds v. Sims, 377 U.S. 533 67
Russell v. U. S., 369 U.S. 749 (1962) 56

Shenandoah Chamber of Progress v. Frank Associates, Inc., 95 F. Supp. 719 (E.D. Pa., 1950) 40, 44
Shuttlesworth v. Birmingham, 376 U.S. 339 (1964) 56
State ex rel. Allis Chalmers Mfg. Co. v. Boone Circuit Ct., 227 Ind. 327, 86 N.E.2d 74 ..... 32, 40, 41
State v. Frew, 24 W.Va. 477 31
Strauder v. West Virginia, 100 U.S. 303 47

Taylor v. Louisiana, 370 U.S. 154 26
Tennessee v. Davis, 100 U.S. 257 (1879) 47
Thompson v. Louisville, 362 U.S. 199 (1960) 26, 29, 39
Trimble v. Commonwealth, 5 Va. Law Reg. 92 (1899) 33

United Mine Workers, Dist. 12 v. Illinois State Bar Assn., 389 U.S. 217 (1967) 51, 55, 56
U. S. v. Jones, 308 F.2d 26 (2d Cir. 1962) 38
U. S. v. Thompson, 319 F.2d 665 (2d Cir. 1963) 27

Wansley v. Commonwealth, 205 Va. 412 ..... 6, 7, 34, 53, 54
Wansley v. Commonwealth, 205 Va. 419 ..... 6, 7, 34, 53, 54
Wells v. Commonwealth, 21 Grat. 509 (1871) 28, 29, 30, 33, 35, 36, 38, 39, 51, 54, 59

PAGE

Constitutional Provisions:

United States Constitution:

Article VI, Clause 2 ..... 2, 5, 40, 45
First Amendment 2, 5, 55, 56
Fifth Amendment 5
Sixth Amendment 2, 5, 51
Fourteenth Amendment 2, 3, 5, 26, 51, 55, 56, 58, 60

United States Statutes:

28 U.S.C. §1257(3) 2
28 U.S.C. §1443 ..... 3, 8, 9, 14, 45
28 U.S.C. §1446 ..... 4, 14, 19, 32, 34, 36, 37, 40, 41, 45, 57
28 U.S.C. §1447 14

Virginia Statutes:

Va. Code §8-463 ..... 23, 24
Va. Code §8-469 24
Va. Code §8-489 23

Virginia Supreme Court of Appeals Rules:

5:4 ..... 23, 24
16 ..... 20, 59

Other Authorities:

25 ALR 2d 1045 ..... 32, 40, 41
Canons of Ethics, Canon 15 54
Dangel, Contempt, Sec. 171 (1939) 27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

PHILIP J. HIRSCHKOP,

Petitioner,

—v.—

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

To the Justices of the Supreme Court of the United States:

Petitioner, Philip J. Hirschkop, a member of the Bar of the State of Virginia, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia dismissing a Writ of Error and Supersedeas previously granted by that Court to review an order refusing to vacate a judgment of criminal contempt of court entered against Petitioner by the Corporation Court of the City of Lynchburg, rendered on June 5th, 1967.

Opinions Below

The opinion of the Supreme Court of Appeals of Virginia dismissing the Writ of Error (opinion by Justice Albertis S. Harrison, Jr.), rendered on March 10, 1969, is not yet reported. It is reprinted herein as Appendix A.

The opinion of the Corporation Court of the City of Lynchburg, rendered on September 13, 1966 holding Petitioner in criminal contempt of court is not yet reported. It is reprinted herein as Appendix B.

Jurisdiction

The judgment of the Supreme Court of Appeals of Virginia was entered on March 10th, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

Questions Presented

1. Whether the conviction of the Petitioner, an attorney, for contempt of court violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States in that the record is entirely lacking in evidence to support the charges?

2. Whether the conviction of the Petitioner, an attorney, for contempt of court based upon his attempted exercise of the federal remedy of civil rights removal violates Article VI, Clause 2 of the Constitution of the United States, the Supremacy Clause?

3. Whether the conviction of the Petitioner, an attorney, for contempt of court violates the fundamental guarantee of right to counsel embodied in the Sixth and Fourteenth Amendments to the Constitution of the United States?

4. Whether the conviction of the Petitioner, an attorney, for contempt of court, violates the First Amendment to the Constitution of the United States as incorporated into the Fourteenth Amendment?

5. Whether the conviction of the Petitioner, an attorney, for contempt of court violates the notice requirement of the Due Process Clause of the Fourteenth Amendment?

6. Whether the conviction of the Petitioner, an attorney, for contempt of court constitutes selective enforcement of state law in violation of the Fourteenth Amendment?

7. Whether the conduct of the contempt proceeding by the original trial judge deprived Petitioner of a fair trial in violation of the Due Process Clause of the Fourteenth Amendment?

Statutes and Constitutional Provisions Involved

1. Title 28 U.S.C. §1443, Civil Rights Removal

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law. June 25, 1948, c. 646, 62 Stat. 938.

2. Title 28 U.S.C. §1446, Procedure for Removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within twenty days after receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within twenty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within twenty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c) The petition for removal of a criminal prosecution may be filed at any time before trial.

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred

by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(f) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ of habeas corpus, and the marshal shall thereupon take such 939, amended May 24, 1949, c. 139, §83, 63 Stat. 101.

3. Article VI, Clause 2, of the Constitution of the United States, the Supremacy Clause.

4. First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

Statement of the Case

1. Statement of Facts

This petition brings to the Court serious and substantial questions under the Constitution of the United States raising fundamental issues touching the independence of the Bar and the ability of an American lawyer without fear

of reprisal to raise in the interests of his clients available federal rights and remedies.

Petitioner Philip J. Hirschkop is a member of the Bar of the State of Virginia. He was thirty-one years of age at the commencement of this case and was admitted to practice law in 1964.[1]

Petitioner was retained to act in the capacity of local resident counsel in the criminal prosecutions then pending against Thomas Wansley, a young Negro resident of the City of Lynchburg. The *Wansley* litigation, *Wansley* v. *Commonwealth,* 205 Va. 412, and 205 Va. 419 involved capital cases with serious racial and constitutional overtones. The defendant, Thomas Wansley, an indigent youngster seventeen years of age, had been charged with two capital crimes of rape of an elderly white woman and a Japanese-American woman.[2] He had been tried in two proceedings, one directly following the other, in the Corporation Court of Lynchburg in the winter of 1963 before Judge O. Raymond Cundiff, the same Judge who issued the rule to show cause against Petitioner and subsequently convicted Petitioner of criminal contempt. Wansley was found guilty and sentenced to capital punishment in both proceedings. After the death of the defendant's original trial lawyer, present counsel for Wansley assumed the responsibility for the cases. The Virginia Court granted writs of error and *supersedeas* to review the judgments, and on review, reversed all the convictions.[3]

---

[1] All references to the portion of the record reproduced in the printed record in the Court below will be referred to as (R).

[2] Wansley was also charged with robbery of the white woman. See *Wansley* v. *Commonwealth, supra* at p. 420.

[3] He was also convicted of the crime of robbery of the white woman and his punishment fixed at twenty years' imprisonment.

In the first case, involving the alleged rape of one Kyoko Fleshman, *Wansley* v. *Commonwealth,* 205 Va. 412, the Virginia Court held that certain remarks of Judge Cundiff to the jury "were improper and constitute reversible error," requiring a reversal of the conviction, 205 Va. at 418. In the second case, involving the alleged rape and robbery of one Annie Carter, *Wansley* v. *Commonwealth,* 205 Va. 419, the Court held that in a case in which "the life of an ignorant boy 17 years of age has been declared forfeit" and where "the question to be determined is whether the accused, who has been sentenced to suffer the extreme penalty, has had that fair and impartial trial guaranteed to him by our Constitution. . . . the trial court abused its discretion in not granting [a] continuance prayed for so as to enable accused to employ a court reporter for the purpose of recording the evidence and other incidents of the trial," 205 Va. at 423. These convictions were also reversed and remanded for new trials.

Petitioner was retained as local resident counsel after these reversals of the original conviction,[4] actively participating in all subsequent proceedings under the direction of the chief trial counsel, William M. Kunstler, of the New York Bar. The first of the rape charges, involving Kyoko Fleshman, has been dismissed by the trial court on motion by the defense for failure to prosecute.

On November 15th and 16th, 1965, Petitioner participated in the retrial of the alleged robbery of Annie Carter. This trial resulted in a mistrial based upon the inability of the jury to arrive at a verdict. At the conclusion of the

[4] All of the facts set forth in the following statement of facts are uncontested, based upon the record in the hearings and trial in this matter.

trial Petitioner moved for an order from the Court directing that the defendant, an indigent, be afforded written transcripts of all prior proceedings, including lengthy hearings of motions, in order to prepare adequately for the retrial of the remaining capital rape charge. The trial court granted this motion and set the retrial on the remaining capital charge for February 14, 1966 (R, pp. 29, 34). Concerned because of his failure to receive these essential transcripts, Petitioner prepared and filed a motion for a continuance of the trial on January 28th (TR. Apr. 8, p. 18). This motion was denied (R, pp. 35, 36). On February 2nd, Judge Cundiff wrote to the Petitioner stating that delivery of the transcripts had been delayed because the court reporter had become ill, and that Petitioner would receive them soon (R, p. 36).

On February 7, Petitioner becoming more and more concerned about the unavailability of the transcripts for trial preparation, called Mr. Kunstler, the senior responsible attorney, who was then in New Orleans, calling the problem to his attention. Petitioner also called Judge Cundiff that afternoon reporting the situation to him (R, p. 36). Later that day, a portion of the robbery trial transcript arrived, but none of the transcripts of the extensive pre-trial hearings (R, p. 28; R, p. 89). By Thursday the 10th, after having waited three more days, Petitioner again conferred by phone with Mr. Kunstler, the senior attorney. In that discussion, Mr. Kunstler raised for the first time the question that the client's right to a fair trial under these circumstances might require removal of the cause to the federal courts pursuant to Title 28 U.S.C. 1443, the Civil Rights Removal Statute (R, p. 38). Mr. Kunstler advised Petitioner to prepare the necessary federal papers required in

a civil rights removal proceeding and to ascertain whether Miss Ruth Harvey, a member of the Bar of the State of Virginia, and a member of the Bar of the United States District Court for the Western District of Virginia, would be available to handle the removal proceedings, if they become necessary in the opinion of counsel (R, p. 38). Petitioner, in accordance with his instructions, called Miss Harvey, a Virginia attorney with extensive experience in civil rights removal procedures (R, p. 46), and asked her, as a member of the Bar of the Federal Court from the Western District of Virginia,[5] whether she could handle the removal proceeding if it became necessary (R, p. 45). Miss Harvey said that she could handle the proceeding and Petitioner told her he would notify her if his instructions were to proceed with federal removal (R, p. 55). Petitioner telephoned the United States District Court Clerk's Office in Lynchburg and ascertained that the Clerk's office would be open at 9:00 o'clock Monday morning (R, p. 38). He then drafted civil rights removal petition papers that evening and sent them to Lynchburg on a Greyhound bus. He then wrote a letter to Miss Harvey emphasizing that, if a decision to remove was made, the petitions must be filed prior to 9:30 Monday morning the 14th, pursuant to the dictates of the governing federal statute, Title 28 U.S.C. 1443 (R, p. 39).

On Saturday, February 12th, no transcripts had arrived by noon and Petitioner called Mr. Kunstler and informed him of the situation (R, p. 89). Mr. Kunstler decided, as chief counsel in the case, that the best interests of the client, Thomas C. Wansley, required the removal of the case to

[5] At that time Petitioner was not a member of the bar of the United States District Court for the Western District of Virginia.

the federal courts (R, p. 89). Mr. Kunstler believed that under these circumstances, this defendant in a capital case could not receive a fair trial in the state court and directed Petitioner to take all necessary steps to remove the case to the federal courts (R, pp. 89, 90). Accordingly Petitioner called Miss Harvey in Danville and requested her to proceed with the removal proceedings at once (R, pp. 40, 97).

Miss Harvey arrived at the Lynchburg office of the clerk of the United States District Court for the Western District of Virginia at 8:45 A.M. Monday morning with the necessary removal papers. She was accompanied by Mrs. Essie Gordon, a resident of Lynchburg who had received the papers on Friday by bus from Petitioner (R, pp. 46, 54). Miss Harvey waited outside the door of the closed office until approximately nineteen minutes after nine, when Miss Dorothy Pettigrew, the deputy clerk of the United States Court, arrived (R, p. 46).[6] Meanwhile Petitioner, in his office in Alexandria, had received a telephone message from "a court" in Lynchburg. He called the federal clerk's office and as the clerk arrived, at about 9:20, she answered the phone and told Miss Harvey she was being called. Miss Harvey spoke for a brief minute to Petitioner and told him about the delay in opening the federal clerk's office. Miss Harvey said that the federal court clerk had just walked in and that she was filing the papers (R, p. 98). Petitioner then urged Miss Harvey to "get the papers filed and get the court notified immediately" (R, p. 41).

Miss Harvey then immediately tendered the removal petitions to the federal clerk. It is uncontested on the

[6] On direct examination for the Commonwealth, the Deputy Clerk testified that she arrived late that morning, "between 9:15 and 9:20" (R, p. 104).

record that the federal removal papers were tendered to the federal clerk prior to 9:30 A.M., the formal time of commencement of the state trial.[7] Miss Pettigrew, the deputy federal clerk, a witness for the Commonwealth, testified in the following words on cross-examination at Petitioner's trial:

> Q. You do not know then, Miss Pettigrew, what time it actually was filed? A. No, I do not remember.
> Q. The fact remains, though, that it was presented to you before 9:30? A. Yes.
> Q. There is no question about that. A. No, sir.

Furthermore, there is no conflict in the record as to when the federal clerk "stamped" the papers as "filed". The only direct testimony on this question was Miss Harvey's to the effect that Miss Pettigrew "took the papers and stamped them" prior to 9:30 (R, p. 47). After the clerk "stamped them" (R, p. 47) she then raised certain questions concerning whether Petitioner, being a member of the Eastern District Bar, could verify the petition. After calling her superior, Mr. Hanes, in Danville, Miss Pettigrew agreed that the papers were proper (R, p. 108). This may have occurred after 9:30. Miss Pettigrew herself was not clear on the exact timing of this later discussion which took place after the papers had been tendered and stamped. She said she was satisfied after "some little time, a little talk about it" (R, p. 107).[8] The record is

[7] Both Miss Harvey's testimony and that of Mrs. Essie Gordon confirm Miss Pettigrew's testimony that the removal petition was tendered to the federal clerk *prior* to 9:30 A.M., Monday morning (R, p. 55).

[8] When pressed by Judge Cundiff on her own examination as to whether the petition was finally "filed" after 9:30 that morning, even on this question Miss Pettigrew was unclear. Thus she replied to a direct question of the Judge "I would hate to say—I did not look at the clock, but I would not think so" (R, p. 106).

wholly clear, however, without any contradiction, that the removal petition was "tendered" prior to 9:30 A.M. and was "stamped" prior to 9:30 A.M.

Immediately after these discussions with the federal clerk, Miss Harvey "rushed" to the state courtroom (R, p. 55). The court had convened at 9:30 or "within five minutes thereafter" (R, p. 60). The judge had taken a recess on learning of the absence of defense counsel from the courtroom (R, p. 61). As soon as Miss Harvey arrived at approximately 9:55 (R, p. 84) she informed the court that the case had been removed to the Federal Court and served, pursuant to the provisions of Title 28 U.S.C. 1443 and 1446, copies of the papers upon the clerk of the state court, the Judge, and the Commonwealth Attorney (R, p. 84). The record is perfectly clear that all provisions of the federal statute were wholly complied with and that the state court judge was fully informed that the case had been removed to the federal courts. Thus Mr. Martin, the Clerk of the Corporation Court testified on direct examination for the Commonwealth that:

> "Miss Ruth Harvey, an attorney from Danville, Virginia, appeared and informed the Court that the case had been removed to the federal court, the petition had been filed for removal" (R, p. 84).

At this point Judge Cundiff expressed a profound misconception of the federal law of removal which basically conditions the entire future course of these proceedings against Petitioner. Judge Cundiff was under the impression that the filing of the removal petition and the notice to the Court and the adverse parties was *insufficient* to effect the removal of the case to the Federal Court and

terminate proceedings in the state court. He believed that the Federal Court was required to enter an "order in this matter" and that since "there has been no order entered to remove it" (R, p. 20) he *retained* jurisdiction to try the criminal case. Accordingly, Judge Cundiff believed that *at that time* Petitioner and Mr. Kunstler were required to be present to proceed with the trial of the defendant. The trial judge's entire action in striking Mr. Kunstler from the rolls as an attorney and issuing a rule to show cause why Petitioner should not be held in contempt was predicated upon his stated belief that federal removal had *not* been affected by the filing of the petition and the service of the notice of its filing, and that, despite these admitted facts, the state court *then*, at 9:55 A.M. had power to proceed to a trial of the defendant, and Petitioner and Mr. Kunstler had a duty to be present to proceed with such a trial. Because this obvious misconception of controlling federal law wholly conditioned all future proceedings against Petitioner, we set forth here in full for the Court the actual colloquy out of which the rule to show cause arose, lest there be any suggestion that we here have overstated the posture of the case:

> The Court: Just stand back over there and speak loud enough so everyone in the courtroom can hear you. Let's don't have any private conversations. All right, I will hear you. What is your name?
>
> Miss Harvey: I am Ruth Harvey, an attorney from Danville, Virginia.
>
> The Court: All right, go ahead.
>
> Miss Harvey: If Your Honor please, in the case of Thomas Carlton Wansley, that case has been removed to the federal district court.

The Court: I *don't see the order.* (Emphasis added.)

Miss Harvey: Pardon?

The Court: *I don't see the order that removed it. (Miss Harvey hands a document to the Court). I don't see an order, the Judge hasn't entered an order in this matter, this is just pending.* (Emphasis added.)

Miss Harvey: Well, if Your Honor please, that is the reason that under Section 28: 14, 43, 46 and 47[9] when a case is removed and a petition is filed in the federal court it automatically removes that case and really no order is necessary and it has been taken out of the hands of the state courts.

The Court: Do you represent him at this time?

Miss Harvey: Yes, sir.

The Court: In this case?

Miss Harvey: Yes, sir.

The Court: Are you ready to go to trial now?

Miss Harvey: If Your Honor please, we feel that it would be impossible to go to trial on this case at this time because it has been removed.

The Court: *There has been no order entered to remove it. All you have done is filed a petition.* (Emphasis added.)

Miss Harvey: Well, under the United States Code Annotated the filing of the petition automatically removes the case from the jurisdiction of the State courts.

---

[9] Although the transcript reads as quoted, obviously Miss Harvey was referring to Title 28 U.S.C. §§1443, 1446 and 1447, the Civil Rights Removal Statute.

The Court: Where is Mr. Hirschkop this morning? He has not given this court any notice that he no longer represents the defendant.

Mr. Jester: No sir—and he even signed the petition.

Miss Harvey: He is also associated—I am associated with Mr. Hirschkop and Mr. Kunstler in this case.

The Court: Well, you haven't been in the case before today, have you?

Miss Harvey: Well, I believe that I had talked with you previously.

The Court: Oh, on a continuance motion or something like that.

Miss Harvey: That is right—but I have not actually appeared before you.

The Court: And of course you don't know sufficiently about the case to try the case on its merits, I wouldn't think—do you, at this point?

Miss Harvey: No, I am not prepared to try it on its merits and because of the removal which automatically removes it out of the jurisdiction of this court, certainly I would not be prepared to go ahead and try it.

The Court: Mr. Jester, do you have any comments to make?

Mr. Jester: Well, I would have thought that the propriety of competent counsel would have made it such that they would have given us notice prior to this date. This case has been set for trial since November, as I recall it, and counsel Hirschkop has been in constant communication with us. He talked with me on the telephone on Monday of last week, that is the first day of the term, verifying the fact that the case in-

volving the Japanese woman had been *nolle prossed.* He made no reference to removal, he made no reference to the matter of getting out of the case and this was the first news I have had of it. Now, I see it appears to be that this was filed in the clerk's office of the United States District Court here in Lynchburg but it is not dated.

The Court: *Well, all this is is a notice that it is going to be filed down there. There has been no other action removing the case.* (Emphasis added.)

Miss Harvey: Well, I can only refer Your Honor to the Code section.

The Court: Well, I understand you are not prepared to defend the case because you are not familiar with it to try it on the merits. I understand that.

Miss Harvey: Yes, sir.

The Court: His attorneys, Mr. Hirschkop and Mr. Kunstler are the ones that owe the obligation to defend this man as far as this court is concerned, and in any event it cannot be tried today. Mr. Clerk, will you call the venire, please—the special panel and regular panel and let's see if they are all present so we will know who is present. (Whereupon, all jurors were called by the Clerk of the Court).

The Clerk: If Your Honor please, they are all here.

The Court: *Mr. Jester, in view of the fact that counsel is not here, of course we cannot go ahead with this trial without having counsel that is familiar with the case. Mr. Clerk, at this time I want you to issue a rule against Mr. Hirschkop in Alexandria returnable to this court on next Monday morning to show cause why he should not be found in contempt of court in failing to*

appear here this morning (emphasis added). And of course Mr. Kunstler being an out-of-state lawyer I am going to issue an order directing that his name be stricken from the lawyers that are permitted to practice in this court. He only had been allowed to by reason of the fact that the Court allowed him to come, but when he fails to appear here deliberately he is not a person that I want to practice in this court. So therefore he will not be allowed to appear in this court any more as an attorney. And issue that rule returnable at 9:30 next Monday morning for Mr. Hirschkop. The state has been put to considerable expense today, having called the jurors here, court reporters, doctors summoned—and these lawyers deliberately are playing fast and loose with this *court in failing to appear* (emphasis added).

Mr. Jester: I would estimate that somewhere in the neighborhood of $500.00 worth of expense has been incurred here this morning.

The Court: *And of course I can't prejudice his rights by forcing him into a trial because his attorneys weren't here, but I can take care of his attorneys when I get them* (emphasis added) before this court. Do you have anything further you want to say? It looked like you wanted to make some motion or say something, or did you?

Miss Harvey: Well, I just simply wanted to say to Your Honor that this case was filed in federal court. I am sorry that Miss Pettigrew neglected to enter the date on that but I want to say if anyone wants to verify it with her I am sure she will.

Mr. Jester: When was that filed? When was the petition filed down there?

Miss Harvey: This morning.

Mr. Jester: This morning?

Miss Harvey: Yes.

Mr. Jester: I think the record should show that, that counsel has stated to the Court that the petition under Crim. No. 66-CR-1-L by counsel's admission was filed in United States District Court for the Western District of Virginia at Lynchburg on this date February 14, 1966, which is the same date that the case had been scheduled for trial in the state court.

The Court: I understand from you, Mr. Wansley, that he told you last Monday, that Mr. Hirschkop told you he would be here today, didn't he?

The Defendant: He didn't actually say that he would be here but he gave the indication that he would,

The Court: Well, he didn't tell you he wasn't going to be here, did he?

The Defendant: No, sir.

The Court: Didn't he say "I will see you next Monday?"

The Defendant: No, he said he would see me soon. At that time Mr. Kunstler—I mean, yeah, Mr. Kunstler was in New Orleans.

The Court: I am not talking about Mr. Kunstler, I am talking about Mr. Hirschkop.

The Defendant: I don't know where Mr. Hirschkop was at the time.

The Court: Well, he called you, didn't he?

The Defendant: Yes, sir, I received the call.

The Court: Well, the matter will have to be continued. *This case cannot be tried at this time, irrespective of its removal but because of lack of counsel. Are*

you going to continue to represent him in this matter now, or the Court will have to appoint an attorney to represent him if he doesn't have counsel of his own choosing. (Emphasis added.)

Miss Harvey: I will continue to represent him in this matter, Your Honor, and as I say, certainly I believe at this point, because of the jurisdiction of the federal court, it would be unwise to proceed—

The Court: Well, that is a matter that the court will have to pass on at this time, and until it is passed on, of course, this court cannot take any further action in the matter. Now, Mr. Martin, on the regular panel of jurors we will need for the 16th—

Whereupon, there was a discussion between the Court and counsel regarding jurors (R, pp. 20 to 24).

We do not understand the Commonwealth to challenge the accuracy of this transcript or the obvious conclusion from its face that the State court judge on February 14th was acting under a profound misconception of the meaning of the governing federal statute and the controlling federal law.[10] He believed as the record fully reveals, contrary to the plain words of the federal statute and the unanimous conclusions of all federal and state courts which have ever considered the issue that the filing of a removal petition

---

[10] See for example the plain words of Title 28 U.S.C. 1446, subdivision (e):

(e) Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded. See the cases discussed in Point Two of the Argument, *infra*.

with the federal court and the serving of notice upon the parties did *not in and of itself* divest the state court of jurisdiction to proceed. He believed, contrary to the plain words of the federal statute that an "order" of a federal court was required to effect removal, and that consequently, *for this reason,* Petitioner and Mr. Kunstler were under a duty to proceed then and there with a state court trial.

2. Proceedings Below

Petitioner was informed of the rule to show cause that afternoon and immediately called Judge Cundiff on the telephone and expressed his apologies for any inconvenience tendered to the Court and his good faith belief that federal removal was necessary in the interests of his client, that his presence had not been necessary to effectuate federal removal, and that after federal removal was effected there was no duty to be present in the state court since that court could not proceed under the controlling federal statute. He expressed the same sentiments in a three page letter mailed that date to the State Court Judge (R, p. 42). Despite this good faith explanation of his conduct Judge Cundiff continued to press the contempt proceedings against Petitioner.

Although Mr. Kunstler was concededly the senior trial counsel in the case (R, p. 69), and could have been served with a rule to show cause under Rule 16 of this Court (R, p. 110), and was personally within the jurisdiction of the Corporation Court subsequently on April 8th, in Lynchburg, only Petitioner was charged with criminal contempt of court. This was in the face of admitted testimony that Petitioner's conduct in this matter was wholly under the direction of Mr. Kunstler as senior trial counsel (R, pp. 69, 88).

Moreover, on precisely the same facts and same record upon which Petitioner *was convicted* of criminal contempt of court on September 13, Mr. Kunstler, on April 8, was, by the same Judge, ordered reinstated to the roll of attorneys with all sanctions against him lifted (R, p. 66).

After an expression of opinion by the Court of Appeals for the Fourth Circuit on May 25th, that perhaps another explanation to the State trial judge might suffice, see opinion of May 25th, Petitioner once again wrote to Judge Cundiff restating his good-faith belief in the propriety of his conduct and his apologies for any inconveniences which might have been occasioned by the tardiness of the arrival of the federal clerk that morning (R, p. 67). Shortly thereafter Petitioner filed with Judge Cundiff letters from prominent jurists in this State, and members of the bar attesting to his character, integrity, and respect for the judicial processes.

Judge Cundiff, nevertheless, continued to press the proceedings. Petitioner, therefore, on June 13, wrote to Judge Cundiff formally requesting that he be informed more precisely on the exact nature of the charge against him. Judge Cundiff responded on June 20, advising Petitioner that the rule itself contained the reason for its issuance.[11]

---

[11] The Rule states "It appearing that the case of *Commonwealth* v. *Thomas Carlton Wansley* was set for trial on today and that Philip J. Hirschkop, the attorney of record for the said Thomas Carlton Wansley, failed to appear:

Now, therefore, we command you that you summon the said Philip J. Hirschkop to appear before the Corporation Court for the City of Lynchburg, Virginia, at the courthouse thereof, on the 21st day of February, 1966, at 9:30 o'clock A.M. to show cause, if any he can, why he should not be punished for his alleged contempt of court, in failing to appear on today."

On July 17th, Judge Cundiff denied a motion to dismiss the Rule and a trial was held before Judge Cundiff on September 13th.

At the trial the Commonwealth case consisted solely of testimony of the Corporation Court Clerk, the City Sergeant, and on rebuttal the Federal Court Deputy Clerk. Their testimony related to a narrative of the events of February 14th. Mr. Kunstler and Petitioner testified for the defense and the transcript of the April 12th hearing at which Mr. Kunstler was restored to the rolls was deemed admitted into evidence including the testimony of a number of witnesses. The facts which emerged from the trial are virtually uncontested and reveal the progression of events as set forth in this Statement of Facts.

At the conclusion of the trial, Judge Cundiff found Petitioner guilty of criminal contempt and sentenced him to a fine of $50.00 and imprisonment of five days in jail (R, pp. 114, 115, 116). Defense counsel requested that the jail sentence be suspended (R, p. 116) and Judge Cundiff suspended the jail sentence on certain conditions which included the condition that he not state in future pleadings in the federal courts as well as state courts "allegations that are incorrect" (R, pp. 117, 118). The trial judge made it quite clear that this condition of suspension of the jail sentence applied directly to the filing of federal pleadings. This emerged from the following colloquy about the sentence with defense counsel:

> The Court: No, I said in the future I want him to make sure that everything that is filed he makes sure that he has knowledge of it and not make allegations that are incorrect.

Mr. Cacheris: In this court or in the federal court?

The Court: Well, in any court when he is talking about this court or speaking of this court.

Mr. Cacheris: You are also speaking of federal papers, I take it?

The Court: Yes, if he files a petition I want him— (R, p. 117).

Petitioner filed a motion to set aside the judgment of contempt on October 4, 1966. The motion was denied on October 14, 1966. A petition for writ of error to the Virginia Supreme Court of Appeals was filed on February 6, 1966. On April 26, 1967, the Virginia Court dismissed the petition on the ground that "the appeal was not perfected in the manner required by law" as required by Rule 5:4 and Code Sections 8-463 and 8-489. On May 24, 1967, Petitioner filed a motion to vacate the judgment of contempt. On June 5, 1967, the Corporation Court granted Petitioner leave to file the motion to vacate the judgment over the Commonwealth's objection, and then denied the motion. The Court then suspended the execution of the judgment to permit the preparation and presentation of the petition for writ of error and supersedeas from the denial of the motion to vacate.[12] A petition for writ of error and supersedeas was filed with the Virginia Supreme Court of Appeals on October 5, 1967, and the writ of error and supersedeas was awarded to Petitioner on December 4, 1967. The Commonwealth then moved to dismiss the writ of error and after full briefs and oral argument on the merits of the appeal, the Virginia Court granted the motion to dismiss the writ. In his opinion for the Court

[12] *Cf.* identical procedure in *Loving* v. *Commonwealth*, 206 Va. 924.

Justice Harrison disposed of the federal constitutional issues raised in the appeal by holding that the judgment of contempt and the sentence imposed were not void under the Constitutions of Virginia and of the United States, and that accordingly the Virginia Court did not have to follow its own procedure permitting motions to vacate a judgment under such circumstances as sanctioned in *Loving* v. *Commonwealth*, 206 Va. 924 (1966) (App. A, p. 73).

Reasons for Granting the Writ

POINT ONE

The federal constitutional questions raised in this Petition are properly before this Court.

Petitioner's original petition for writ of error to the Supreme Court of Appeals of Virginia was dismissed on the ground that "the appeal was not perfected in the manner required by law" as required by Rule 5:4 and Code Sections 8-463 and 8-469 of the Virginia Code. After that present counsel for Petitioner were retained and a motion to vacate the judgment of contempt was made and a new petition for writ of error was filed in accordance with the Virginia practice outlined in *Loving* v. *Commonwealth*, 206 Va. 924, 147 S.E. 2d 78 (1966) in which a petition for writ of error to a refusal to vacate a conviction was allowed long after the original time to appeal had passed, where the judgment was attacked as invalid under the Constitution of the United States. See 206 Va. 924.

This second petition for writ of error was granted by the Virginia Court on December 4, 1967. After full briefs

and oral argument on the constitutional merits, the Virginia Court granted the Commonwealth's motion to dismiss the writ. In his opinion for the Court Justice Harrison in attempting to distinguish the *Loving* case from the present situation, disposed of the federal constitutional issues raised in the appeal by holding that the judgment of contempt and the sentence imposed were not void or invalid "under the Constitutions of Virginia and of the United States". (App. A, p. 73).

Thus, even though the opinion of the Virginia Court did not give its reasons for rejecting petitioner's federal claims, under the time honored practices of this Court the federal questions having been adequately raised below[13] and having been "necessary to the judgment or decree rendered in the case" are properly before this Court. *Murdock* v. *City of Memphis*, 200 Wall. 590 (1874). See also *NAACP* v. *Alabama*, 357 U.S. 449; and *Henry* v. *Mississippi*, 379 U.S. 443 (1965). The Virginia Court has held, and it was "necessary to the judgment" to so hold, that the judgment of contempt was not void under the federal Constitution. Otherwise it would have been compelled to follow the practice outlined in *Loving* v. *Commonwealth*, *supra*, and permit the appeal. Accordingly under the rule of *Murdock* the federal questions raised in this petition are appropriately before the Court. *Cf. Fox Film Corp.* v. *Muller*, "the non-federal ground is so interwoven with the other as not to be an independent matter".[14]

---

[13] All the federal questions raised here were fully raised, briefed and argued at all stages of the proceeding below.

[14] *Henry* v. *Mississippi*, 379 U.S. 443 is instructive here. As the Court there pointed out the "adequate non-federal ground doctrine is necessary to avoid advisory opinions," and that consequently "these justifications have no application where the state ground is

POINT TWO

The state court conviction for contempt of court violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States in that the record is entirely lacking in evidence to support any of the charges.

The conviction of Petitioner for criminal contempt of court is void as a denial of due process of law in "that the record is entirely lacking in evidence to support any of the charges" *Thompson* v. *Louisville,* 362 U.S. 199, 204 (1960). As in *Thompson* there is "no evidence whatever in the record to support" the conviction, 362 U.S. at 206. See also *Garner* v. *Louisiana,* 368 U.S. 157; *Taylor* v. *Louisiana,* 370 U.S. 154.

It is abundantly clear that the judgment of criminal contempt of court is "void as a denial of due process of law", *Thompson* v. *Louisville,* 362 U.S. at 204, that there is "no evidence whatever in the record to support the conviction", 362 U.S. at 206, and that here, as in *Thompson,* "it [is] a violation of due process to convict and punish a man without evidence of his guilt". 362 U.S. at 206.

---

purely procedural" 379 U.S. at 447. The Court further pointed out that "the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question", 379 U.S. at 447. Moreover, even if the Virginia Court had *not* necessarily passed on the federal questions, as it has here, by holding the *Loving* rule does not apply because the judgment is not void under the federal Constitution, this Court has taught that "a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest" 379 U.S. at 447. Here no "legitimate state interest" is served by permitting punishment of an attorney for utilizing a federal statutory remedy on behalf of a client.

As the Virginia Court has itself recently stated, a proceeding in contempt of court is "criminal or quasi criminal in nature" and that, accordingly, "a mere preponderance of the evidence is not sufficient to convict, but the offense charged must be proved beyond reasonable doubt," *Bryant* v. *Commonwealth*, 198 Va. 148, 152. See also *Kidd* v. *Virginia Deposit Co.*, 113 Va. 612, 614; *Nicholas* v. *Commonwealth*, 186 Va. 315, 322; *Local 1333 B United Marine Div.* v. *Commonwealth*, 193 Va. 773. In the present case, there is not even a scintilla of evidence in the record to support a judgment of criminality.

This is so because, as the Virginia Court has had the occasion to point out, the essence of the offense of criminal contempt of court is the *mens rea*, the specific intention of the highest obligations of an independent bar. As the Virginia Court pointed out:

> "The idea of a technical contempt, committed by accident or misadventure, cannot be supported, under the authorities, where the intention—the male animo—is wholly wanting." *Postal Telegraph Cable Co.* v. *Norfolk & W. R. Co.*, 88 Va. 929.

The teaching of the Virginia Court in *Postal Telegraph* reflects the uniform recognition of all courts that the law of criminal contempt of court has, as its most basic postulate, a requirement that a conviction can rest only upon a showing, beyond any reasonable doubt, that the charged party has manifested an "intention to show disrespect for, and defiance of, the court" or other tribunal. Dangel, Contempt, Sec. 171 (1939) at p. 75. See, e.g., *Panico* v. *United States*, 375 U.S. 79 (1963); *United States* v. *Thompson*, 319 F. 2d 665 (2nd Cir. 1963); *People* v. *Post Standard Co.*, 13 N.Y. 2d 185, 195 N.E. 2d 48 (1963).

And as the Virginia Court has also pointed out, this "male animo", this essential gravamen of the offense, is wholly lacking when an attorney-at-law is charged with contemptuous conduct where it is "shown that he was acting in good faith for what he believed to be the interest of his client, and not from disrespect to the court." *Wells* v. *Commonwealth*, 21 Grat. 509 (1871).

The *Wells* case is wholly dispositive here. The Court laid down principles in *Wells*, which reflect a deep concern for the highest obligations of an independent bar. As the Court pointed out:

> "It is unquestionably the duty of an attorney to endeavor, to the best of his ability, by his advice and counsel, and by his conduct, to secure to his client every legal right and remedy to which he may think him even probably entitled; and if he fails to do it he is faithless to his trust, and should be held morally and legally responsible. And if he acts in good faith, if he demeans himself honestly, he is not responsible for an error in judgment. But it is of the utmost importance to the proper administration of justice, that he should be free and unembarrassed in the discharge of his professional duty."

An attorney, like any citizen, the Court then points out, is not immune from punishment for intentionally and corruptly conspiring to obstruct justice. But the high "importance to the proper administration of justice" that an Amercian lawyer be "free and unembarrassed in the discharge of his professional duty" requires a rule of law that "where . . . the attorney has acted in good faith, although he may have erred in judgment, he is not liable." *Wells* v.

Commonwealth, 21 Grat. at p. 509. And so the Virginia Court spelled out the guiding rules which require a conclusion that under its *own* views of criminal contempt there is not a shred of evidence to sustain a finding of contempt against Petitioner.

> "To vindicate his conduct, it is not necessary to be shown that he was right in his opinions. *But it is necessary to be shown that he was acting in good faith, for what he believed to be the interest of his client, and not from disrespect to the court, or from a design to oust it of its lawful jurisdiction.*" (Emphasis added.)

a) These principles compel the conclusion that there is "no evidence whatever in the record to support the conviction" *Thompson* v. *Louisville, supra.* The extraordinary nature of this case lies in the fact that neither the Commonwealth nor the trial court challenge the obvious fact that the attorneys in this case, both Petitioner and Mr. Kunstler "acted in good faith" in the legal moves they made. *Wells* v. *Commonwealth,*[15] *supra.* Both the State Court and the Commonwealth agree completely that the attorneys had "a perfect right to remove the case." [Statement of Judge Cundiff, R, pp. 63, 64. See also statement of Judge Cundiff, R, p. 78, "under the federal laws, he had a right to file the petition to remove it. Regardless of expense of the Commonwealth, that just had to be."] The Commonwealth Attorney stated at the close of the trial "There was an absolute right so far as protecting their

---

[15] Both Petitioner and Mr. Kunstler testified fully as to their "good faith" exercise of judgment as lawyers in deciding to remove the case to the federal courts. See, for example, R, p. 42; R, p. 90; R, pp. 89, 98. This testimony stands uncontradicted by any testimony in the Commonwealth's case.

client's interests was concerned to file this removal petition" (R, p. 113).

If the Commonwealth and the trial judge agree that the attorneys' decision to remove the case from the state court was not only a "good faith" legal decision[16] of *Wells* v. *Commonwealth* but an "absolute right" (R, p. 113), required for "protecting their client's interests" (R, p. 113) then it is difficult to understand what they are being punished for other than the *manner* in which they have exercised in good faith an "absolute right" required to protect a "client's interest." Cf. *Wells* v. *Commonwealth, supra.* It is inconceivable that in an American court an attorney could be punished for good faith efforts "to secure to his client every legal right and remedy to which he may think him even probably entitled," *Wells* v. *Commonwealth, supra,* whether or not he makes mistakes in pursuing the remedies. Cf. *Holt* v. *Virginia,* 381 U.S. 131, "our conclusion is that these petitioners have been punished by Virginia for doing nothing more than exercising the constitutional right of an accused and his counsel . . . ." 381 U.S. at 138. But this is precisely what the Commonwealth Attorney says this case is all about. He put it this way to the trial court at Petitioner's trial:

---

[16] The "good faith" quality of the legal action taken in removing the case, cf. *Wells* v. *Commonwealth, supra,* is emphasized by the frank concession of the trial court that the transcripts were in fact necessary for the preparation of the pending trial. (Tr. July 12, p. 8. "The Court: . . . Anybody could see that the motion transcript would be necessary for a trial.") The fact that the removal proceeding was a "good faith" legal action, cf. *Wells* v. *Commonwealth, supra,* is of course further highlighted by the fact that the Court of Appeals for the Fourth Circuit stayed the initial order of remand for almost six months, affirming only after the decision of this Court in *Peacock* v. *City of Greenwood,* 384 U.S. 808 (1960).

"There was an absolute right so far as protecting their client's interests was concerned to file this removal petition. Now, the question and the only question as I see it before the Court is the manner in which it was done so far as this Court was concerned" (R, p. 113).

And in a brief filed in the state Supreme Court at a previous stage in the proceeding, the Commonwealth Attorney placed the case this way:

"Any lawyer who fails to take the proper steps to represent his client in all cases, is negligent and derelict in his responsibility, both to his client and to the Court, but at the same time, there is a right and a wrong way to do everything". (Brief in opposition to petition for writ of error, p. 6.)

When the issue is put this way, as the Commonwealth itself puts it, the confusions which beset these proceedings are swept away. What was the "manner in which" the removal petitions were filed which is so "heinous," so "intentionally contemptuous" as to warrant the invocation of a power the Virginia Court itself conceded "can be justified by necessity alone, and should be rarely exercised, and never, except when the necessity is plain and unmistakable," *Carter* v. *Commonwealth,* 96 Va. 791, 813 [quoting approvingly from *State* v. *Frew,* 24 W. Va. at p. 477]?

The record answers the question. The trial judge, as we have pointed out in the Statement of Facts, was of the mistaken impression on February 14th, that the "manner" of removing the case was erroneous—that the mere filing of the petition with the Federal Court and the giving of notice to the adverse parties was not sufficient to remove

the case from the state court, and that consequently Petitioner and Mr. Kunstler had a duty to be there to try the case then and there. But the trial judge was wrong on his assumption and we do not understand the Commonwealth to contest this now. The federal statute was plain on its face, and the federal and state cases are manifold that the state court loses jurisdiction upon the filing of the removal petition, and that on notice to the court and adverse parties "the State court shall proceed no further unless and until the case is remanded." Title 28 U.S.C. Sec. 1446. See for example: *Allman* v. *Hanley et al.*, 302 F. 2d 559 (5th Cir., 1962); *Arkansas* v. *Howard*, 218 F. Supp. 626 (D.C. Ark., 1963); *Hopson* v. *North American Insurance Co.*, 71 Idaho 461, 233 P. 2d 799; *State ex rel. Allis Chalmers Mfg. Co.* v. *Boone Circuit Ct.*, 227 Ind. 327, 86 N.E. 2d 74; *Brown* v. *Wechsler et al.*, 135 F. Supp. 622 (D.C. 1955); *Lowe* v. *Jacobs*, 243 F. 2d 432 (5th Cir., 1957). See generally 25 ALR 2d 1045 and cases cited in Point Three *infra*.

If the completion of the procedural steps of removal results in a federal command that "the State court shall proceed no further," 28 U.S.C. 1446, then the "good faith" opinion of Petitioner that he had no "duty" to be present to proceed to try the case in the state court, see R, pp. 98, 99, was not merely an action "in good faith" but rather an action wholly grounded in law and authority. To predicate a criminal contempt upon such an action, which would be the result of sustaining the rule to show cause as originally issued, would not merely fly in the face of the most time honored precedents of the federal courts. It would present a threat to the independence of the bar unparalleled in the history of the Nation. It would permit criminal sanctions to be imposed upon an attorney because a judge

wrongfully concludes that a lawyer has erroneously invoked a legal remedy in behalf of his client. Nothing could more dangerously undermine the necessity that an American lawyer should be "free and unembarrassed in the discharge of his professional duty" *Wells* v. *Commonwealth, supra.*[17] It would be punishment "for doing nothing more than exercising [a] constitutional right" *Holt* v. *Virginia, supra.*

b) Perhaps recognizing the impossibility of sustaining the contempt charge upon the grounds originally advanced by the trial judge in the issuance of the rule to show cause, the Commonwealth advanced throughout the case a very different ground in an effort to rescue the Rule to show cause. Thus the Commonwealth rested its case upon a concept that the "contemptuous" conduct was the violation of some sort of "duty" to notify the Commonwealth Attorney or the court in *advance* of filing the removal petitions so as to save expense and inconvenience. Beyond the consideration that Petitioner was not charged in the Rule to show cause with any such violation of any such duty, cf. *Cole* v. *Arkansas,* 333 U.S. 196 (1948) this contention founders on the elementary proposition that there was, of course, no such duty upon the attorneys. Thus the trial judge himself recognized that there was no duty in law requiring defense attorneys to notify their adversaries in advance of their intentions to remove. As the trial judge held, such

---

[17] Even if Petitioner had engaged in any conduct remotely approaching the permissible line of criminal sanctions, cf. *Wells* v. *Commonwealth, supra,* the immediate explanation and apology for any inconvenience to the trial court more than satisfies the Virginia Court's recognition of the efficacy of purgation in contempt cases. *Wells* v. *Commonwealth, supra; Postal Telegraph Cable Co.* v. *N. & W. R. Co., supra; Trimble* v. *Common.,* 5 Va. Law Reg. 92 (1899).

advance notice "is not required under the law" (R, p. 91), and in response to the Commonwealth Attorney's suggestion that "there are certain things the law doesn't require but common courtesy dictates" (R, p. 91), the trial judge quite properly replied, "of course, we are not going into lack of common courtesy here, Mr. Jester—we have to stick strictly to the law" (R, pp. 91, 92).

At an earlier point in the proceeding the trial court cut through the prosecution's persistent discussion of inconvenience and expense to the Commonwealth occasioned by lack of prior notice of what remedies the defense lawyers proposed to take in their client's interests, by pointing out "under the federal law, he had a right to file the petition to remove it. *Regardless of expense of the Commonwealth, that just has to be*" (R, p. 78, emphasis added). We do not think it necessary to belabor this point. The Commonwealth concedes that the lawyers had the "absolute right" to remove this case to the federal court through the invocation of the federal civil rights removal statute. This right is an important and substantial federal and national right. *Rachel* v. *Georgia,* 384 U.S. 780 (1966). The federal law does not require prior notice of its invocation, 28 U.S.C. 1446. And in the context of a capital case involving an indigent Negro youngster, it is shocking to suggest that lawyers who properly and lawfully invoke federal remedies should be criminally punished because their invocation of the remedy provided by the Congress of the United States "inconveniences" the state which is seeking the "extreme penalty" against their clients. Cf.; *Wansley* v. *Commonwealth, supra.* At the very minimum, failure to notify one's adversary in advance in a capital case of important moves a defense lawyer intends to make can hardly be

called conduct so devoid of action "in good faith," so as to authorize the invocation of criminal sanctions. Cf. *Wells* v. *Commonwealth, supra.*

c) Having rejected quite properly the theory of the Commonwealth that Petitioner should be held criminally liable for failing to notify his adversaries in *advance* of any intentions to utilize the federal removal remedy, and unwilling any longer to rest upon the original grounds upon which the Rule issued—namely the erroneous supposition that the removal was incomplete and that Petitioner and Mr. Kunstler had a duty to be present to *try* the criminal case that day in the state court, the trial judge finally sought to justify the imposition of criminal penalties upon an assertion of a newly formulated duty—the proposition that in any event Petitioner had the personal duty to be the individual who was present to notify the court that the case was being removed (R, p. 115).[18]

Again placing to one side the obvious proposition that this was not the conduct for which Petitioner stood charged under the original Rule to Show Cause, cf. *Cole* v. *Arkansas, supra;* the theory not only flies in the face of the Virginia Court's command in *Wells* that "good faith actions" of attorneys are not subject to criminal contempt sanctions, but is actually once again an erroneous misconception of the governing federal law of removal. Miss Harvey was not a "messenger," as the Commonwealth rather condescendingly calls her, sent to carry through what was Pe-

[18] Thus the trial judge held in his opinion adjudicating petitioner in criminal contempt: "Irrespective of whether the petition was filed or not, though, it was the solemn obligation on the part of counsel to be present and advise this Court that the petition had been filed" (R, p. 115).

titioner's own responsibility. A removal proceeding is a federal proceeding. It is initiated in a federal court. 28 U.S.C. 1446. In this case the federal court in question was the United States District Court for the Western District of Virginia. Petitioner was not at that time a member of the Federal Bar of the Western District. Of the Virginia lawyers, only Miss Harvey, who was a member of that Bar, could properly take charge of the federal removal proceedings. She was retained by Petitioner and Mr. Kunstler for this purpose (R, p. 46).[19] Miss Harvey, a member of the Virginia Bar, and of the Bar of the United States District Court for the Western District of Virginia, was a thoroughly experienced attorney well versed in the techniques of removal procedure. Mr. Kunstler had instructed Petitioner to retain Miss Harvey to handle the removal proceedings because she "had accomplished literally hundreds of removals in Danville in the summer of 1963 and was quite familiar with the technique" (R, p. 93). The retention of Miss Harvey to handle all aspects of the federal removal proceeding as an experienced member of the Bar of the U.S. District Court for the Western District of Virginia was not only an "action in good faith" for which attorneys may not be punished, *Wells* v. *Commonwealth, supra,* it was a proper and wholly responsible action.

Once Miss Harvey was retained to handle the removal proceeding she was the proper attorney to see through all phases of the proceeding. She presented the petition

---

[19] "A. (Miss Harvey) . . . And then of course since I was a member of the Western District I was asked to handle that end of it" (R, p. 46).

for filing to the federal clerk. The petition was presented and stamped prior to 9:30 A.M. See *Statement of Facts, supra.* She then proceeded at once to carry through the procedural steps of notifying the clerk of the state court, the judge, and the adverse parties. It is acknowledged that she did this. The removal was then completed and she quite properly called to the attention of the trial judge the provisions of Section 1446 of Title 28 of the United States Code requiring that "the State Court shall proceed no further unless and until the case is remanded." These were her duties and responsibilities as the member of the Bar of the Western District of Virginia, responsible for the removal proceedings. We cannot conceive of what further duty she or any other member of the Bar owed to the state court. Again it is the federal statute which spells out the duty.

Once the petition was filed in the federal court the cause was removed and, on notice to the state court and the adverse parties, no further actions could be taken in the state court. 28 U.S.C. §1446. The federal statute required only that notice be given to the state court clerk and the adverse parties. Petitioner had arranged in a wholly responsible and "good faith" fashion for that notice to be given by the lawyer who was now responsible for the transferred federal proceeding. The federal statute no more imposed a "duty" upon Petitioner to personally serve the notice than it imposed a "duty" upon him to notify the Commonwealth Attorney in advance of his intentions to utilize the federal removal remedy. And in any event, even if Petitioner were wrong on this score, which we suggest he was not, there is not a shred of evidence to

sustain a finding that his action in retaining Miss Harvey to fulfill the requirements of the federal removal statute was not an "action" in good faith.

d) Finally, there is some suggestion that for reasons not wholly articulated, Miss Harvey's arrival at 9:55 rather than 9:30 in the state courtroom, is conduct upon which Petitioner can be held liable in criminal contempt within the meaning of *Wells* v. *Commonwealth*. Even if Miss Harvey's conduct that morning could be, for the purposes of the criminal law vicariously charged against Petitioner, but see *United States* v. *Jones*, 308 F. 2d 26 (CA 2, 1962), *Hicks* v. *United States*, 150 U.S. 442, the contention is extraordinary in the face of the Virginia Court's decision in *Postal Telegraph Cable Co.* v. *Norfolk, supra*. For as the Court said in *Postal Telegraph*, "the idea of a technical contempt, *committed by accident or misadventure* cannot be supported, under the authorities, where the intention—the *male animo*—is wholly wanting." (Emphasis added.) Here, the suggestion of any intentional contemptuous activity on the part of Miss Harvey and thus vicariously ascribed to Petitioner is absurd. To impose criminal penalties upon a lawyer because the federal court clerk was twenty minutes late in arriving at her office would be the most grotesque example of "contempt committed by accident or misadventure." *Postal Telegraph Cable Co.* v. *Norfolk, supra*. The record is perfectly clear that Miss Harvey was present at the federal clerk's office at 8:45 A.M., fifteen minutes earlier than its formal opening hour; that the federal clerk was almost twenty minutes late; that after receiving the petition and stamping it *prior* to 9:30 A.M., the federal clerk delayed

Miss Harvey a short time later while she checked her procedures with her superior; and that Miss Harvey "rushed" to the state court room as soon as she left the federal clerk's office. As in *Postal Telegraph,* here, the record could not be clearer that "the intention—the *male animo*—is wholly wanting." 88 Va. 929. To impose criminal sanctions because of such conduct by an attorney would utterly undermine the ability of the bar to meet the high obligations of the profession set for it by the Virginia Court itself that "it is unquestionably the duty of an attorney to endeavor, to the best of his ability, by advice and counsel, and by his conduct, to secure to his client every legal right and remedy to which he may think him even probably entitled; and if he fails to do it he is faithless to his trust, and should be held morally and legally responsible," *Wells* v. *Commonwealth, supra,* at p. 508.

It is abundantly clear that the judgment of criminal contempt of court is "void as a denial of due process of law", *Thompson* v. *Louisville,* 362 U.S. at 204, that there is "no evidence whatever in the record to support the conviction", 362 U.S. at 206, and that here as in *Thompson,* "it [is] a violation of due process to convict and punish a man without evidence of his guilt." 362 U.S. at 206.

POINT THREE

The state court judgment of contempt violates Article VI, Clause 2 of the Constitution of the United States, the Supremacy Clause.

The judgment of contempt was wholly void in that the trial court was completely without jurisdiction to issue the Rule to show cause upon which the judgment rests. Title 28, U.S.C. 1446, subdivision (e) provides specifically as follows:

> "(e) Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded."

The decided cases are uniform both in the state and federal courts that the impact of this federal statute is to deprive the state court of any jurisdiction to proceed in any manner whatsoever "unless and until the case is remanded." See for example *Allman* v. *Hanley,* 302 F. 2d 559 (5th Cir., 1962); *Arkansas* v. *Howard,* 218 F. Supp. 626 (D.C. Ark., 1963); *Hopson* v. *North American Insurance Co.,* 71 Idaho 461, 233 P. 2d 799; *State ex rel. Allis Chalmers Manufacturing Co.* v. *Boone Circuit Court,* 227 Ind. 327, 86 N.E. 2d 74; *Brown* v. *Wechsler et al.,* 135 F. Supp. 622 (D.C. 1953); *Lowe* v. *Jacobs,* 243 F. 2d 432 (5th Cir., 1957); *Dienstig* v. *St. Paul Fire and Marine Insurance Co.,* 164 F. Supp. 603 (SDNY, 1957); *Shenandoah Chamber of Progress* v. *Frank Associates, Inc.,* 95 F. Supp. 719 (E.D. Pa., 1950); see, generally, 25 ALR 2d 1045.

The cases are crystal clear that upon compliance with the procedural forms of the removal statute, jurisdiction is removed from the state court, contrary to the repeated assumptions on February 14th of Judge Cundiff that some form of "order" of a federal court was required to effect removal and deprive the state court of jurisdiction. A few of the leading authorities will suffice. In *Allman* v. *Hanley et al., supra,* the United States Court of Appeals for the Fifth Circuit recently stated: "Upon the filing of a proper petition for removal and upon compliance with the applicable statutes, the state court loses jurisdiction and all further process must issue from the Federal court . . . ." 302 F. 2d at 562. In *Arkansas* v. *Howard, supra,* the District Court said that on complying with the procedural steps in the statute "this shall effect the removal and the state court shall proceed no further unless and until such case is remanded", 218 F. Supp. 626. In *Hopson* v. *North American Insurance Co., supra,* a case viewed as determinative on the question, see 25 ALR 2d 1045, the Supreme Court of Idaho said in words fully persuasive here: ". . . . that until and unless the case is remanded no valid proceedings can be taken in the State court at any time following the filing of such petition . . . and giving notice thereof . . . . [F]urthermore that any action so taken in the State Court thereafter and prior to remanding the cause to such State Court will have no force or effect . . . the new statute [28 U.S.C. 1446] not only does not sanction such proceedings in the State Court but expressly prohibits them." 233 P. 2d at 802.[20]

---

[20] See also *State ex rel. Allis Chalmers Mfg. Co.* v. *Boone Circuit Court, supra* [Supreme Court of Indiana]; *Lowe* v. *Jacobs, supra. Cf.* Statement of Court of Appeals for Fifth Circuit:

> "Appellee's answers that this statute as amended in 1949 [28 U.S.C. 1446] expressly deprives the State Court of juris-

The impact of the authoritative case law on the situation presented by this petition is clear. We do not understand the Commonwealth to contest the plain facts that the removal petition was filed and that notice was given *prior* to the issuance of the Rule to show cause. The transcript of February 14th is perfectly clear on this question. There may be some question as to the exact moment of formal "filing" [cf. finding of trial judge, Tr. Sept. 13, with testimony of Federal Deputy Clerk that petition was "tendered" *prior* to 9:30 A.M. and uncontested testimony of Miss Harvey that petition was "stamped" prior to 9:30 A.M.]. We discuss later the significance, if any, of this confusion as to what "filing" means under the statute. Cf. *Brown* v. *City of Meridian*, 356 F.2d 602 (5th Cir., 1966). But there is no disagreement whatsoever on the fundamental facts upon which the jurisdiction of the trial court rested to issue the Rule to show cause. The removal petition was filed and notice was duly given to the trial judge, the court clerk and the Commonwealth Attorney *prior* to the issuance of the Rule to show cause.

The trial judge finds as a "fact" in his bench opinion that "at 9:30 o'clock the petition, according to the evidence before this Court, had not been filed; whether it was wrongful on the part of the United States District Court in not receiving it, but this court had jurisdiction at 9:30 and there was no attorney to answer at that time" [TR. Sept. 13, p.

---

diction to proceed with any phase of litigation that has been properly removed unless and until the case is remanded . . . We have no doubt that this is the effect of the law as it now stands. Prior to the amendment of 1949 this removal, to be effective must be in respect to a case in which a party was 'entitled to remove'. The language now employed is 'a defendant . . . desiring to remove.'"

65]. Putting aside the obvious fact that this conclusion is erroneous on the record—Miss Harvey having testified without contradiction, either on cross-examination or by Miss Pettigrew, the Federal Clerk, that the petition was "tendered" and "stamped" prior to 9:30 A.M. [TR. April 8, pp. 50, 51], the trial judge was once again in error as to the meaning of the determinative federal law. It is now wholly clear that the good faith *lodging* of a petition of removal with a federal clerk is a timely "filing" of the petition within the meaning of the statute *regardless* of whether the clerk delays the formal act of "filing" of the petition. This is clearly so held in the latest federal pronouncement on the question, *Brown* v. *City of Meridian*, 356 F. 2d 602 (5th Cir., 1966). In this case the Court of Appeals for the Fifth Circuit pointed out that failure to comply with local rules requiring filing removal petitions in duplicate cannot justify a holding that the *tendering* of the petition was not a "timely filing." The Court said in words directly applicable here: "technical requirements of Local Rules should not be enforced where petitioners seek to remove—prosecutions from the state courts if the requirement would delay matters so as to deprive petitioners of effective access to federal courts . . . . Under the circumstances of this case *the lodging of the petitions with the clerk* . . . was a timely filing 'before trial' within the requirement of 28 U.S.C. Section 1446 (e)." 356 F. 2d at 606. (Emphasis added) *Dienstag* v. *St. Paul Fire and Marine Insurance Co.*, 164 F. Supp. 603 (SDNY 1957) is even more direct. The Court held "It is perfectly apparent that . . . the removing defendant complied with the statute and did indeed *present its petition* with the accompanying bond [a requirement only in a *civil* removal] within the time prescribed," 164 F. Supp. at 605. (Emphasis added) See also

Shenandoah Chamber of Progress v. *Frank Associates, Inc.*, 95 F. Supp. 719 (E.D. Pa. 1950); *Patterson* v. *Refining Engineering Co. and Village of Rundosa, New Mexico*, 183 F. Supp. 459 (D.C.N.M. 1960).

It is perfectly clear under these cases that even if the petitions had *not* been "stamped" prior to 9:30 A.M. as the record shows without contradiction, the "tendering" of the petition, admittedly prior to 9:30 A.M. was a "timely filing" within the meaning of federal law. *Brown* v. *City of Meridian, supra,* and cases cited therein. Moreover, it is further clear from the decided cases that "timely filing" effects the removal, and even if *notice* is served after subsequent action of the state court the removal is effective for jurisdictional purposes as of the time of filing. *Shenandoah Chamber of Progress* v. *Frank Associates, Inc., supra* ["if the statute has been complied with by prompt filing, the removal is effective *for all purposes as of the time of the filing of the removal petition in the U.S. court,*" 95 F. Supp. at 720, emphasis added]; *Patterson* v. *Refining Engineering Co., et al., supra; Liberty National Bank of Dickinson* v. *Daly,* 96 N. W. 2d 897 (Sup. Ct. of North Dakota, 1959). [. . . "filing in state court is merely a procedural and ministerial act having no effect on federal jurisdiction—the matter here under consideration illustrates that federal jurisdiction on removal exists even before the completion of the removal proceedings"]. See also *Lever Brothers Co.* v. *J. Eavenson and Sons,* 7 F. Supp. 679 (SDNY 1954); *Hoffman* v. *Bethlehem Steel Corp.,* 31 F. Supp. 683 (N.D. W. Va. 1940); *Jones* v. *Elliot et al.,* 94 F. Supp. 567 (1950) ["after all the notice merely clinches the removal, and delay in the notification should not vitiate a transfer already completed *a curia ad curiam,*" 94 F. Supp. at 567].

The record could not be clearer that the cause had been removed prior to the issuance of the order to show cause. In fact, it is perfectly obvious that it was precisely the filing of the petition and the formal giving of notice to the Judge, the Clerk and the Commonwealth Attorney which impelled the colloquy then resulting in the Rule to show cause. We invite the Court to examine directly the section of the transcript of the events of February 14th we have set out in full in the Statement of Facts. Under all the decided cases the legal conclusion is compelling. In the words of the Supreme Court of Idaho in *Hopson,* the Rule to show cause, issued "following the filing of such petition . . . " and giving notice thereof "has no force or effect." 233 P. 2d at 802. The trial court was wholly without jurisdiction to issue the Rule and the subsequent criminal proceedings against petitioner were an effort to penalize him for properly resorting to federal jurisdiction.

This imposition of criminal sanctions upon the attempted exercise of the federally granted remedy established in the Civil Rights Removal Statute, Title 28 U.S.C. 1443, 1446, violates Article VI, Clause 2 of the Constitution of the United States, the Supremacy Clause.

It is a concept as old as the Federal Union that a state may not use otherwise lawful power so as to interfere with, impede, or punish a citizen for the exercise of a right granted by the laws or Constitution of the United States. In the early days of the Republic, Chief Justice Marshall enunciated concepts which have guided the national and state courts ever since, and which prohibit the exercise of state power so as to inhibit, restrict or limit a right set forth by virtue of the authority of the national sovereignty.

Brown v. *State of Maryland,* 12 Wheat. 419, discussed the impact of the Supremacy Clause in terms which are dispositive here. The Chief Justice wrote that the "great and universal truth" is that the powers of the several states "cannot reach and restrain the action of the national government within its proper sphere," 12 Wheat. at 448. See also *McCulloch* v. *Maryand,* 4 Wheat. 316 (1819) and *Martin* v. *Hunter's Lessee,* 1 Wheat. 304 (1816). And in applying this basic principle upon which the concept of a federal union depends, the Chief Justice used as his first example of the limiting impact of the Supremacy Clause upon the powers of a state, a proposition which is controlling here. He pointed out that under no circumstances could the power of a state "reach the administration of justice in the courts of the union". 12 Wheat. at p. 449. But that is precisely the impact of the contempt judgment here. An imposition of criminal sanctions which rests upon efforts to exercise the Federal right of removal is an effort to "reach the administration of justice in the courts of the union", 12 Wheat. at p. 449. And, as in *Brown,* it is an effort which collides with the Supremacy Clause of the federal Constitution.

Kalb v. *Feuerstein,* 308 U.S. 422 (1940), is directly controlling. In this decision the Supreme Court refused to permit a state court to utilize otherwise valid authority to interfere with rights granted under federal law, in this instance the federal Bankruptcy Act. As Mr. Justice Black there said for the Court:

> "The States cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land." [308 U.S., at 439].

See also *Hines* v. *Lowrey,* 305 U.S. 85; *Davis* v. *Wechsler,* 263 U.S. 22.

The federal Civil Rights Removal Statute provides an important remedy designed by the Congress to protect the "rights of racial equality". *Georgia* v. *Rachel,* 384 U.S. 780 (1966). Its constitutionality was originally sustained in *Strauder* v. *West Virginia,* 100 U.S. 303. No state, under the principles of *McCulloch* v. *Maryland* and *Brown* v. *Maryland,* can interfere with the exercise of a federal removal remedy. This was specifically decided in *Tennessee* v. *Davis,* 100 U.S. 257 (1879). In this case the Court, by Mr. Justice Strong, explained in terms directly applicable here, why state power may not be exercised in interference with a granted federal right of removal:

> "Before the adoption of the Constitution, each State had complete and exclusive authority to administer by its courts all the law, civil and criminal, which existed within its borders. Its judicial power extended over every legal question that could arise. But when the Constitution was adopted, a portion of that judicial power became vested in the new government created, and so far as thus vested it was withdrawn from the sovereignty of the State. Now the execution and enforcement of the laws of the United States, and the judicial determination of questions arising under them, are confided to another sovereign, and to that extent the sovereignty of the State is restricted. The removal of cases arising under those laws, from State into Federal courts, is, therefore, no invasion of State domain. On the contrary, a denial of the right of the general government to remove them, to take charge of and try any case arising under the Constitution or laws of